

ORDINANCE TO REVISE THE EQUAL BUSINESS OPPORTUNITY PROGRAM

THE CITY COUNCIL OF THE CITY OF DURHAM ORDAINS:

Section 1. Section 18-50 through section 18-79 of the City Code is revised as follows:

ARTICLE III. - EQUAL BUSINESS OPPORTUNITY PROGRAM

Sec. 18-50. - General.

- (a) This chapter establishes a plan to help to ensure that the city's contracting practices provide equal opportunities for city contracting for underutilized business enterprises owned by minorities and women, doing business in the city's contracting marketplace.
- (b) This chapter is enacted pursuant to authority provided by law, including section 84.1 of the Charter of the city and G.S. 160A-17.1(3a).

Sec. 18-51. - Policy statement.

It is the policy of the city to provide equal opportunities for city contracting for underutilized business enterprises owned by minorities and women, doing business in the city's contracting marketplace. It is further the policy of the city to prohibit discrimination against any firm in pursuit of these opportunities, to conduct its contracting activities so as to prevent such discrimination, to correct the present effects of past discrimination and to resolve complaints of discrimination.

Sec. 18-52. - Definitions.

The following words as used in this chapter have the indicated meanings:

Annual participation goals mean the targeted levels established by the city for the annual aggregate participation in city contracts of underutilized business enterprises owned by minorities and women.

Bid means an offer or response to the City to furnish goods or services, including offers in response to formal and informal bids, responses to requests for proposals, and responses to requests for qualifications.

Bidder means a person that has submitted a bid to the city.

City's contracting marketplace means the geographic and procurement areas in which the city contracts on an annual basis.

Commercially useful function means responsibility for the execution of a distinct element of the work and the risk of the contract which is carried out by actually performing, managing, and supervising the work involved.

Contract means any contract or purchase order through which the city procures goods or services.

Contract classifications means the categories of contracts entered into by the city for contract specific goals may be established. Contract classifications may include, but are not limited to, contracts for (i) construction and repair, (ii) purchase of goods, (iii) professional services and (iv) other services.

Contract specific goals means the goals established for a particular contract classification based upon the availability of UBEs in the scopes of work under the contract, delineated into percentages of UBEs owned by minorities and women.

Contractor means a person that has a contract with the city to provide goods or services.

Director means the director of the equal opportunity/equity assurance department or his or her designee.

EO/EA department means the city's equal opportunity/equity assurance department.

Good faith efforts are actions that the city finds are sufficient to meet the standards in section 18-58.

Goods means apparatus, materials, supplies and equipment.

Joint venture means an association of two or more persons, or any combination of types of business enterprises and persons numbering two or more, proposing to perform a single for profit business enterprise, in which each joint venturer contributes property, capital, efforts, skill and knowledge, and in which the UBE is responsible for a distinct, clearly defined portion of the work of the contract with the city and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility regarding to the contract with the city.

Minority business enterprise (MBE) means a UBE that is owned by any of the following minorities identified by race or ethnicity:

- (1) Black, that is a person having origins in any of the black racial groups of Africa;
- (2) Hispanic, that is a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;
- (3) Asian American, that is a person having origins in any of the original peoples of the Far East, Southeast Asia and Asia, the Indian subcontinent, or the Pacific Islands; or
- (4) American Indian, that is, a person having origins in any of the original Indian peoples of North America.

Participation plan means the list of UBEs that the bidder commits will be utilized, their scopes of work, and dollar value or the percentage of the project or the scopes of work of the contract they will perform.

Program means the equal business opportunity (EBO) program.

Subcontractor means a person that directly or indirectly contracts with a contractor, to provide goods and/or services in connection with a contract, including persons that contract with subcontractors of any tier. The term "user department" means the department of the city that the city manager designates as responsible for initiating the procurement process.

Underutilized business enterprise (UBE) means a business, including a sole proprietorship, partnership, corporation, limited liability company, joint venture or any other business or professional entity that has been certified by (i) the State of North Carolina as a historically underutilized business (HUB) pursuant to G.S. 143-128.4, as amended; (ii) the North Carolina Department of Transportation as a disadvantaged minority-owned or woman-owned business pursuant to G.S. 136-28.4, as amended; or (iii) the Small Business Administration 8(a) Business Development program of the Small Business Administration of the U.S. Department of Commerce pursuant to 15 U.S.C. 637(a), as amended,

Women business enterprise (WBE) means a UBE that is owned by a female.

Sec. 18-53. - Administration.

- (a) The city manager shall implement this chapter.
- (b) The city manager's duties shall include:
 - (1) Adopting rules for the implementation and monitoring of the program.
 - (2) Informing UBEs of city contracting opportunities.
 - (3) Providing information and assistance to UBEs relating to city procurement practices and procedures, and bid specifications, requirements, and prerequisites.
 - (4) Identifying relevant contract classifications and establishing MBE and WBE goals for each identified contract classification.
 - (5) Evaluating bidders' and contractors' achievement of the contract specific goals or good faith efforts to meet contract specific goals.
 - (6) Working with user departments to monitor contracts to facilitate prompt payments to UBEs and compliance with contract specific goals and commitments.
 - (7) Receiving, reviewing, and acting upon complaints and suggestions concerning the program.
 - (8) Collecting data to evaluate the program and other city contracting initiatives.
 - (9) Monitoring and reporting on the program and the city's progress towards the annual participation goals.

- (c) The user departments which receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the program:
- (1) Assisting in the identification of available UBEs, and providing other assistance in meeting the annual participation and contract specific goals.
 - (2) Performing other activities to support the EBO program.
 - (3) Gathering and maintaining both prime and subcontracting data for those contracts which they manage.
 - (4) Submitting subcontracting data to the director within 14 days of progress payments and 30 days of contract closeout.
 - (5) Managing contracts in a consistent manner to facilitate contract compliance in utilization of UBEs.
 - (6) Submitting to the director, on or before the beginning of each fiscal year, the department's annual UBE contracting goal based upon a project identification survey listing all upcoming projects, estimating the probable monetary value, the projected bid advertisement date and the necessary qualifications.

Sec. 18-54. - Race- and gender-neutral measures to ensure equal opportunities for all contractors and subcontractors and to promote business development.

The city manager shall develop and use race- and gender-neutral measures to facilitate the participation of UBEs in city contracting activities. These measures may include, but are not limited to:

- (1) Arranging solicitation times for the presentations of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of interested persons.
- (2) Providing timely information on contracting procedures, bid preparation, and specific contracting opportunities.
- (3) Holding pre-bid conferences, where appropriate, to explain the projects and to encourage potential bidders to solicit available UBEs as subcontractors or as joint venturers.
- (4) Adopting prompt payment procedures, including requiring by contract that contractors pay their direct subcontractors within a stated period of receipt of payment from the city, subject to appropriate exceptions.
- (5) Reviewing bonding and insurance requirements to eliminate unnecessary barriers to contracting with the city.
- (6) Maintaining a bidders list, consisting of all persons bidding on city prime contracts and bidding or quoting on city-funded subcontracts.
- (7) Providing technical assistance, which may include:

- a. A surety bonding assistance and support program to provide access to surety bonding and contract financing.
- b. A mentor-protege program.

Sec. 18-55. - EBO program eligibility.

- (a) Only businesses that meet the definition of a UBE may be eligible for participation in the program.
- (b) Where federal or state law or regulations or any agreement between the city and a federal or state agency requires different eligibility standards, the applicable federal or state standards shall apply, including, if applicable, the regulations promulgated by the United States Departments of Transportation and Housing for contracts involving federal funds. Where the city is to receive, apply, administer, or use funds from the federal government or the state government or any entity, agency, or grantee of either of them, if the city is required to apply a disadvantaged business program or program whose purposes are to help ensure opportunities for small firms owned by socially and economically disadvantaged persons, that other program, instead of this chapter, shall apply in the award and administration of the contract.
- (c) To remain eligible, a UBE must maintain its original certification status with its certifying entities during participation in the city's EBO program. Any change in its certification status shall be grounds for disqualification and removal from the EBO program.
- (d) It is the responsibility of the UBE to notify the city manager of any change in its circumstances affecting its status with its certifying entity and eligibility for the program. Failure to do so within a reasonable time of the change may result in the firm's decertification.

Sec. 18-56. – MBE and WBE goal setting.

- (a) To encourage prime contracting opportunities for UBEs, no goals shall be set for contracts where the city estimates the contract value to be less than \$30,000.
- (b) The city manager shall establish contract specific goals according to contract classifications for MBEs and WBEs, based on normal industry practice, the availability of at least three UBEs to perform the scopes of work under the contract and the city's utilization of UBEs to date. If less than three UBEs are available to perform the scopes of work under the contract, no goals will be established. The contract specific goals for the contract classifications shall be maintained by the director.
- (c) The city manager shall periodically evaluate, and if appropriate, make adjustments to the contract specific goals applied to the contract classifications for MBEs and WBEs during the life of program as necessary to maintain the integrity and purpose of the program.

Sec. 18-57. - Counting participation of UBEs.

- (a) The entire amount of that portion of a construction contract that is performed by the UBE's own forces shall be counted, as well as the cost of goods obtained or leased by the UBE for the work of the contract (except goods the UBE subcontractor or joint venture partner purchases or leases from the prime contractor or its affiliate).
- (b) The entire amount of fees or commissions charged by a UBE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.
- (c) When a UBE performs as a participant in a joint venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the joint venture's contract that the UBE performs with its own forces and for which it is separately at risk shall be counted.
- (d) Only expenditures to a UBE that is performing a commercially useful function shall be counted. To determine whether a firm is performing a commercially useful function, the city will evaluate the amount of work contracted (whether by prime contract or subcontract), industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and other relevant factors. To perform a commercially useful function, the UBE must be responsible, with respect to goods used on the contract, for negotiating price, determining quality and quantity, ordering the goods, installing (where applicable) and paying for the goods itself. A UBE does not perform a commercially useful function if its role is limited to that of an extra participant in the contract through which funds are passed in order to obtain the appearance of UBE participation. If a UBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice, it is presumed not to perform a commercially useful function. When a UBE is presumed not to be performing a commercially useful function, the UBE may present evidence to rebut this presumption at a time and manner as determined by the city manager.
- (e) One hundred percent of the cost of the goods obtained from a UBE manufacturer or regular dealer shall be counted. The term "manufacturer" means a firm that operates or maintains a factory or establishment that produces, on the premises, the goods required under the contract. The term "regular dealer" means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the goods of the general character described by the specifications or required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the goods. Packagers, manufacture representatives, or other persons who arrange or expedite transactions are not regular dealers.

- (f) One hundred percent of the fees for the delivery of goods required on a job site shall be counted only if the payment and amount of such fees are customary in the applicable industry. The cost of the goods shall not be counted towards the fees.
- (g) If a UBE is decertified during its performance of a contract, the dollar value of work performed after it has ceased to be certified shall not be counted.
- (i) In determining achievement of contract specific goals, the participation of a UBE shall not be counted until that amount has been paid to the UBE.
- (j) If a UBE meets the definition of both an MBE and a WBE, its participation may only be counted as either an MBE or WBE.

Sec. 18-58. - Contract pre-award compliance procedures.

- (a) In all solicitations for which contract specific goals have been established, the bidder shall submit a participation plan when required by the city manager detailing all subcontractors from which the bidder solicited bids or quotations and its achievement of the contract specific goals or its good faith efforts to do so. The plan shall be submitted in accordance with the schedule and instructions required by the city manager. If the bidder fails to achieve the contract specific goals, documentation of its good faith efforts to do so is due at the time specified in the solicitation. The list of UBEs provided by the city to a bidder establishes the universe from which a bidder must solicit UBEs.
- (b) Any agreement between a bidder and a UBE in which the bidder requires that the UBE not provide subcontracting quotations to other bidders is prohibited.
- (c) UBEs shall respond to relevant requests for quotations.
- (d) Where the bidder has not achieved the contract specific goals, the city manager will determine whether the bidder has made good faith efforts to achieve those goals. In making this determination, the city manager will consider, at a minimum, the bidder's efforts to:
 - (1) Solicit through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written or electronic notices) the interest of all UBEs certified in the scopes of work of the contract. The bidder shall provide interested UBEs with timely, adequate information about the plans, specifications, and requirements of the contract to allow UBEs to respond to the solicitation. The bidder must follow up initial solicitations with interested UBEs.
 - (2) Select portions of the work to be performed by UBEs in order to increase the likelihood that the contract specific goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate UBE participation, even when the bidder would otherwise prefer to perform these work items with its own forces. It is the bidder's responsibility to make a portion of the work available to UBEs and to select those portions of the work (including needs for goods) consistent with the availability of UBEs so as to facilitate UBE participation.

- (3) Negotiate in good faith with interested UBEs. Evidence of such negotiation includes the names, addresses, and telephone numbers of UBEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and specific information on why agreements could not be reached with UBEs. The bidder may not reject UBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding UBEs is not in itself sufficient reason for a bidder's failure to meet the contract specific goals, as long as such costs are commercially reasonable. The ability or desire of a bidder to perform the work of a contract with its own forces does not relieve it of the responsibility to make good faith efforts.
- (4) Make efforts to assist interested UBEs in obtaining required bonding, lines of credit, or insurance as required by the city or contractor, or providing alternatives to bonding or insurance for subcontractors, if relevant to the work of the contract.
- (5) Make efforts to assist interested UBEs in obtaining necessary goods or related assistance or services.
- (6) Use the services of the city, available minority/women community organizations, minority and women contractors' groups, government sponsored minority/women business assistance agencies and other appropriate organizations to provide assistance in the recruitment of UBEs.
- (7) Attend any pre-bid meetings scheduled by the city.
- (e) In determining whether a bidder has made good faith efforts, the performance of other bidders in meeting the contract specific goals may be considered.
- (f) A signed letter of intent from all listed UBEs describing the work, including goods and services to be performed or provided by the UBE and the agreed upon dollar value for bids or percentage of professional services pursuant to a request for proposals or description of the services to be rendered pursuant to a request for qualifications shall be due in accordance with the city manager's instructions.
- (g) The city manager shall review the participation plan prior to award, including the scope of work and the letters of intent from UBEs. The city manager may request clarification in writing of items listed in the participation plan, provided such clarification shall not include the opportunity to augment listed UBE participation or good faith efforts.
- (h) If the city manager determines that the participation plan demonstrates that the contract specific goals have been achieved or good faith efforts were made, or that award is in the best interest of the city, then the city manager shall recommend award to the city council.
- (i) If the city manager finds that a bidder did not make good faith efforts, the city manager shall send notice of the finding to the bidder.

- (1) The bidder shall have seven days from receipt of the notice to notify the city manager of its request for a hearing.
- (2) The city manager shall hold a hearing within 14 days, and shall control all aspects of the hearing, including scheduling, conduct, witnesses, and evidence, and may request the attendance of witnesses and production of documents. The bidder's failure to comply promptly with these directions and orders may be grounds for denial of the relief sought.
- (3) The city manager shall send notice to the bidder of the written decision on the appeal within 14 days of the hearing. The city manager's decision shall be final.

Sec. 18-59. - Contract performance compliance procedures.

- (a) Contracts shall provide that the participation plan is binding on the contractor. Contract specific goals become elements of performance by the contractor in favor of the city.
- (b) The contractor shall provide a listing of all subcontractors to be used in the performance of the contract, and subcontractor payment information to the city with each request for payment submitted to the city. The director and the user department shall monitor subcontractor participation during the course of the contract and shall have reasonable access to all contract-related documentation held by the contractor relevant to the contract.
- (c) After the city and the contractor have executed the contract, the contractor shall not make changes to the participation plan or substitute UBEs named in the participation plan without the prior written approval of the city manager. Unauthorized changes or substitutions shall be a violation of this chapter, and may constitute grounds to terminate the contract for breach, withhold payment, and/or subject the contractor to contract penalties or other sanctions.
 - (1) All requests for changes or substitutions of the subcontractors named in the participation plan shall be made to the city manager on a form provided or approved by the city, and shall clearly and fully set forth the basis for the request. A contractor shall not substitute a subcontractor or perform the work designated for a subcontractor with its own forces or with any other subcontractor unless and until the city manager approves such substitution in writing. A contractor shall not allow a substituted subcontractor to begin work until both the director and the city's project manager have approved the substitution.
 - (2) The facts supporting the request must not have been known nor reasonably should have been known by either party prior to the submission of the participation plan. The contractor must negotiate with the subcontractor to resolve the problem. If requested by either party, the city shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the UBE can be substituted only where an agreement cannot be reached on commercially reasonable terms for the correct scope of work.

- (3) The city manager shall allow changes or substitutions of the subcontractor only on the following bases:
 - a. Unavailability after receipt of reasonable notice to proceed;
 - b. Failure of performance;
 - c. Financial incapacity;
 - d. Refusal by the subcontractor to honor the bid or proposal price or qualifications description;
 - e. Mistake of fact or law about the elements of the scope of work of a solicitation where agreement on commercially reasonable terms cannot be reached;
 - f. Failure of the subcontractor to meet insurance, licensing or bonding requirements; or
 - g. The subcontractor's withdrawal of its bid or proposal or qualifications description.
- (4) The city manager shall give written notice to the contractor and the affected subcontractor of the decision whether to permit or deny the proposed change or substitution.
- (5) Where the contractor has established the basis for the substitution to the satisfaction of the city manager, or if the city requires the substitution of a subcontractor listed in the participation plan, the contractor shall make good faith efforts to fulfill the participation plan. The contractor may seek the assistance of the EO/EA department in obtaining a new UBE subcontractor. If the contract specific goals cannot be reached and good faith efforts have been made, the contractor may substitute with a non-UBE.
- (d) If a contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the participation plan, the contractor shall obtain the approval of the city manager to modify the participation plan and must make new good faith efforts to ensure that UBEs have a fair opportunity to bid on the new scope of work.
- (e) Changes to the scopes of work shall be documented by the user department at the time they arise, to establish the reasons for the change and the effect on achievement of the UBE goals.
- (f) If the city manager determines that the contractor has failed to comply with the provisions of the contract, the city manager shall notify the contractor in writing of the deficiencies. The contractor shall have 14 days, or such time as specified in the contract, to cure the deficiencies or establish that there are no deficiencies. If the deficiencies are not cured, the city shall have the right to take all lawful actions.

Sec. 18-60. - Penalties.

- (a) The following violations of this chapter are unlawful and may be prosecuted as a misdemeanor.
 - (1) Providing false or misleading information to the city in connection with an application for eligibility as a UBE.
 - (2) Providing false or misleading information to the city in connection with submission of a bid, responses to requests for qualifications or proposals, good faith efforts documentation, post-award compliance or other program operations.
 - (3) Substituting UBE subcontractors without prior approval.
 - (4) Committing any other violations of this chapter.
- (b) A contractor is subject to withholding of payments under the contract, termination of the contract for breach, contract penalties, decertification as a UBE, or deemed non-responsive or not responsible in future city solicitations and contract awards, if it is found to have:
 - (1) Provided materially false or misleading information in connection with this chapter, an application for eligibility.
 - (2) Provided false or misleading information in connection with the submission of a bid or proposal or documentation of good faith efforts, post-award compliance, or other program operations.
 - (3) Failed in bad faith to fulfill contract specific goals, thereby materially breaching the contract.
 - (4) Repeatedly failed to comply in good faith with substantive provisions of this chapter.

Sec. 18-61. - EBO steering committee.

- (a) The city manager shall appoint a steering committee to review, track, and monitor UBE utilization and advise the city manager on the EBO program.
- (b) The steering committee membership shall consist of city staff appointed by the city manager to include the eoea director and representatives of the city manager's office and all user departments.

Sec. 18-62. - Program review and sunset.

- (a) The city manager shall make an annual report to the city council, detailing the city's performance under the program department by department for the preceding fiscal year.
- (b) The city council will review this report, including the annual participation goals and the city's progress towards meeting the annual participation goals and eliminating discrimination in its marketplace, and revise the program as necessary to meet legal and program requirements.

- (c) If the city council finds that the objectives of the program have been achieved, the city shall discontinue the program.
- (d) The program shall continue in effect until 11:59 p.m. on March 31, 2021 at which time it shall be deemed repealed without further action by the city council.

Sec. 18-63. - Notice.

All notices required or allowed by this chapter shall be in writing and shall be given either by personal delivery, fax, or United States mail, addressed to the last-known address of the addressee. The notice shall be deemed given and received at the time of actual delivery, if it is personally delivered or sent by fax. If sent by United States mail, it shall be deemed given and received upon the third calendar day following the day on which it is deposited with the United States Postal Service.

Secs. 18-64—18-79. - Reserved.

Section 2. This ordinance is effective upon adoption and shall apply to all contracts entered into by the city on or after the date of adoption.

Section 3. All contracts entered into by the city prior to the date of adoption of this ordinance shall operate under the prior ordinance until such contracts are closed or expire.